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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DOMINGO MENDOZA GARCIA, Defendant and Appellant.	G039657 (Super. Ct. No. 07CF0650) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jim Dutton and Ivy B. Fitzpatrick, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Domingo Mendoza Garcia appeals from the judgment entered after a jury found him guilty of possessing a weapon while in custody. Defendant admitted an enhancement allegation that he had been previously convicted of a serious and violent felony.

We affirm. As explained in detail *post*, we reject each of defendant's contentions on appeal as follows: (1) the trial court did not abuse its discretion by denying defendant's motion to relieve his attorney and appoint new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) because defendant did not show either inadequate representation or an irremediable breakdown in the attorney/client relationship; (2) the trial court did not err by admitting into evidence certain inculpatory statements defendant made to law enforcement personnel after he had been read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), notwithstanding defendant's argument such statements were tainted by his pre-*Miranda* admission to police; and (3) although CALCRIM No. 220 does not use the term "element," the jury was properly instructed that the prosecutor has the burden of proving every element of the charged offense beyond a reasonable doubt.

FACTS[1]

On December 25, 2006, Deputy Dustin Fike of the Orange County Sheriff's Department was employed at the Theo Lacy jail. At 4:00 p.m. that day, Fike was looking through a window into defendant's prison cell when he saw defendant standing in the middle of the cell and holding a white object with a razor blade protruding out of the top of it. Defendant's cellmate was lying down on his bunk.

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[1] The following facts are based on the trial testimony of the sole trial witness, Deputy Dustin Fike.

Using the intercom system, Fike directed defendant's cellmate to exit the cell and proceed to visiting booth number 1; defendant's cellmate complied. Fike directed defendant to exit the cell, sit down behind the guard station, lie down on the floor on his stomach, and put his hands behind his back. After handcuffing defendant, Fike performed a full patdown search of defendant; he did not find anything on defendant. Fike escorted defendant to visiting booth number 9 and directed him to sit down. Fike unhandcuffed defendant and locked the door of the booth. Fike along with two other deputies searched defendant's cell. In a brown paper bag on the floor, one of the deputies found a white-handled spoon with a razor protruding through the top of the handle and wrapped tightly with black thread. Fike found more black thread in defendant's property box. Fike characterized the object as a "[s]lashing device."

After defendant was read his *Miranda* rights, he told Fike the item belonged to him and stated he "took a spoon, broke a piece of it off, inserted the razor, and tied it with the black string."[2] Defendant said he used the item to carve on his commissary cup. There are notices in the jail stating that inmates are not allowed to possess any types of weapons or stabbing devices.

BACKGROUND

Defendant was charged in an information with possession of a weapon in custody in violation of Penal Code section 4502, subdivision (a). The information further alleged defendant was previously convicted of first degree burglary in violation of section 459, a serious and violent felony within the meaning of sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1).

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[2] As discussed in detail *post*, at the Evidence Code section 402 hearing on the admissibility of defendant's inculpatory statements to law enforcement on December 25, 2006, Fike testified that before defendant was read his rights under *Miranda*, Fike asked defendant to whom the object belonged; defendant stated the object belonged to him. Defendant's pre-*Miranda* advisement statement was excluded from trial.

Shortly before trial, defendant made a *Marsden* motion. Following a hearing, the court denied defendant's motion.

The trial court also held an Evidence Code section 402 hearing on the admissibility of defendant's inculpatory statements to law enforcement. The trial court ruled that defendant's statement that the object belonged to him, which he made before he was read his *Miranda* rights, was inadmissible, but the statements he made after he was read his rights under *Miranda* were admissible.

The jury found defendant guilty as charged. Defendant admitted the prior conviction allegation.

At the sentencing hearing, the trial court granted defendant's motion to strike the prior conviction allegation and sentenced defendant to the middle term of three years in state prison. Defendant appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S *MARSDEN* MOTION.

Defendant contends the trial court abused its discretion by denying his *Marsden* motion to relieve his attorney and appoint new counsel, and thereby violated his constitutional right to counsel. For the reasons discussed *post*, we disagree.

"'"'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" [Citation.] The

decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would "substantially impair" the defendant's right to effective assistance to counsel.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.)

At the *Marsden* hearing, the trial court asked defendant to explain the grounds for his motion. Defendant told the trial court that he had requested a Spanish-speaking public defender because he thought such an attorney would understand him better; defendant's attorney is not Spanish-speaking. Defendant also told the court, "[e]very time [counsel] speaks with me, he gets upsets and he starts yelling at me. And I told him a while ago—and I told him a while ago to please not to raise his voice because it's my life, the one that I'm fighting for. And what he did was he left me alone talking, and he left." After defendant said, "I don't see the reason that he's helping me," the trial court asked why defendant said that. Defendant responded, "[b]ecause I feel that he's putting pressure on me. He says, 'I'm going to give you five minutes to think,' and he starts yelling at me. And I don't see that he's helping me."

Defendant also said, "[s]ince my first arraignment, I don't know if my rights have been violated." The trial court asked defendant, "[s]ince your first arraignment you think your rights have been violated?" Defendant responded that he did "[b]ecause I just had a video hearing, and I—and I never did what they call waive time. And I don't know what that is, to tell you the truth. And from that point on, it took over—or almost 65 days to take me to preliminary hearing, and they arraigned me twice." Defendant further stated he did not "have anything against" his attorney and respected him, and apologized if his attorney "thinks that I'm not behaving well."

In response, defendant's counsel stated, "from the moment that I met [defendant], I had somebody from my office present with me who was fluent in Spanish, acting as an interpreter between the two of us." Defendant's counsel stated he had

explained to defendant his trial rights, "how this works," and that defendant had been timely arraigned because there was a delay between the date of the incident and the date he was charged with the instant offense, and a motion contending a violation of defendant's right to a speedy trial would have been frivolous.

Defendant's counsel further stated: "In terms of me getting unhappy with him while he's in custody, that is true. I have been upset with him because in each instance where I try to have a conversation with him, he doesn't necessarily listen to what I say or answer the questions I ask. So as of the last time we were in court, in Judge Kelly's court last Monday, I got him an offer that would strike the strike and give [a] minimum low term of two years. And he didn't want that offer. After he asked me to get him credit for time that he was in custody for the misdemeanor, Judge Kelly said no and indicated to me that he had a total of 15 minutes to either take the offer or not take the offer. [¶] So after I went into the back and explained to him why he wasn't eligible for those credits and I explained to him what the offer was, what his options were, what could happen to him if he doesn't take the deal, he didn't have much time left. And Judge Kelly had a jury out and was waiting for that jury to come back. So Judge Kelly was the one who limited the amount of time he had to think about that offer. [¶] [Defendant] said he didn't want that offer and wanted to have a jury determine his guilt or innocence. He's continued to tell me that he didn't know it was a weapon."

Defendant's counsel also said, "[e]ach instance I've tried to explain to him, and he frustrates me. And I will admit that readily. I have raised my voice to him. He doesn't seem to understand or is willing to think about it or to consider his options. And he's been warned that the maximum, if you do not strike the strike and he's found guilty, is eight. He had an offer of two. I don't want him to spend any more than two years in custody at half versus a potential of eight at 85 percent. So it is frustrating. So I will admit to the court that I did raise my voice at him." Defendant's counsel told the court that he did not think there was an irremediable or irreconcilable breakdown in his

relationship with defendant and further stated he would be able to handle the trial "without any problems" and that he was only concerned about defendant's well-being.

The trial court denied the *Marsden* motion on two grounds: "First of all, this *Marsden* motion is belated. It's done after pretrial motions. Some of the pretrial motions have been resolved. We're here in a trial court. And I'm well aware of the fact that this still could be sent out to another court and the pretrial motions could be resolved again. They're not real binding. I understand that. [¶] But the fact is we're about to pick a jury tomorrow morning. And now after I rule on some of the pretrial motions, I end up with a *Marsden* motion. [¶] That's number one. [¶] Number two, and more importantly, when you look at the big picture here, just because there are disagreements between a lawyer and a client and just because a lawyer raises his voice in some way in dealing with a client does not necessarily mean that a *Marsden* motion should be granted. The defendant admits that he has respect for you, [defendant's counsel], and I appreciate that; that is, that he is treating you with respect. [¶] The fact is that he's not entitled to a Spanish-speaking attorney. And as a matter of fact, when you have talked to him, other than a one-minute conversation you have indicated, that the Spanish interpreter has been present. [¶] The defendant says he has nothing against you. He speaks a little bit of English he says. But when you look at the big picture here, everything that has been said in here, there's simply no grounds for a *Marsden* motion. There's no irremedial breakdown in the attorney-client relationship. The two of you get along, at least in terms of having respect for one another. And that's what I glean from the way you've addressed the court, [defendant], and I also respect your opinion on this, [defendant's counsel]. [¶] The *Marsden* motion is denied for all of those reasons." (Italics added.)

Defendant does not contend on appeal that the trial court denied him the opportunity to explain the basis for his *Marsden* motion or that his attorney provided him inadequate representation. Indeed, the record shows the trial court provided defendant

ample opportunity to present his concerns, and does not show defendant's attorney provided ineffective assistance of counsel.

Instead, defendant argues his relationship with his attorney had "devolved into an irreconcilable conflict." But defendant told the court he did not "have anything against" his attorney and he respected him. Defendant's counsel stated he did not believe that there had been an irremediable or irreconcilable breakdown in their relationship. The record further shows defendant's counsel became frustrated and raised his voice at defendant out of concern for defendant and his failure to accept what defendant's counsel believed was a generous plea bargain offer.

Even if we were to construe defendant's statements as establishing his lack of trust in his attorney and inability to get along with him, that would not be enough to support his motion. The California Supreme Court has explained, "'[i]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.'" (*People v. Abilez, supra*, 41 Cal.4th at p. 489; see, e.g., *People v. Alfaro* (2007) 41 Cal.4th 1277, 1320 ["with regard to the alleged conflict between defendant and counsel regarding entry of a guilty plea, a disagreement of this nature, by itself, is insufficient to compel discharge of appointed counsel"]; *People v. Smith* (2003) 30 Cal.4th 581, 606 ["Disagreement concerning tactics, by itself, is insufficient to compel discharge of counsel"].)

Because the record shows the relationship between defendant and his counsel had not irremediably or irreconcilably broken down, the trial court did not abuse its discretion or violate defendant's constitutional right to counsel by denying the *Marsden* motion. (*People v. Abilez, supra*, 41 Cal.4th at pp. 490-491 [elements considered on review of refusal to substitute counsel under federal law are consistent

with California law under *Marsden, supra,* 2 Cal.3d 118 and its progeny].) We therefore do not need to address whether the trial court properly denied the motion on the alternate ground that it was untimely.

II.

THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENDANT'S POST-*MIRANDA* ADVISEMENT STATEMENTS INTO EVIDENCE.

At the Evidence Code section 402 hearing on the admissibility of defendant's statements to law enforcement, Fike testified that after he had found the object in defendant's cell, but before defendant was read his rights under *Miranda,* Fike asked defendant to whom the object belonged. Defendant said it belonged to him; that statement was excluded from trial. After defendant was read his rights under *Miranda,* he told Fike the object belonged to him, explained how he had made it, and said he used the object to carve on his commissary cup. Defendant contends the trial court erred by admitting into evidence the statements he made after he was read his *Miranda* rights because, he argues, such statements were tainted by the inculpatory statement he had made before he had been read his rights.

In considering whether a law enforcement officer obtained a statement in violation of *Miranda,* we defer to the trial court's evaluation of witness credibility and accept the trial court's resolution of disputed facts if supported by substantial evidence. (*People v. Gurule* (2002) 28 Cal.4th 557, 601.) Based upon the facts found by the trial court, we independently determine whether the statement was obtained in violation of *Miranda*. (*People v. Gurule, supra,* 28 Cal.4th at p. 601.)

The failure of a law enforcement official to administer the *Miranda* warning creates a presumption that any statements the suspect makes in the course of a custodial investigation are the products of compulsion. (*Oregon v. Elstad* (1985) 470 U.S. 298, 309-310; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) But a subsequent

statement made following a voluntary and informed waiver is admissible. (*People v. Bradford, supra,* 14 Cal.4th at p. 1033.)

The United States Supreme Court addressed the argument raised by defendant here in *Oregon v. Elstad, supra,* 470 U.S. 298. In that case, two officers went to the defendant's residence to arrest him. (*Id.* at p. 300.) One of the officers had not read the defendant his rights under *Miranda* before he asked the defendant if he knew why the officers were there and whether he knew the victims of a burglary. (*Oregon v. Elstad, supra,* 470 U.S. at p. 301.) The defendant's responses to the officer's questions were inculpatory. (*Ibid*.) The defendant was later advised of his rights under *Miranda*; he waived his rights and gave the police a statement. (*Oregon v. Elstad, supra,* 470 U.S. at p. 301.)

The United States Supreme Court held in *Oregon v. Elstad, supra,* 470 U.S. 298, that although the officer initially failed to administer warnings to the defendant, the defendant's full statement to the police officer after having been read his rights under *Miranda* did not need to be suppressed. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 639.) The Supreme Court in *Oregon v. Elstad, supra,* 470 U.S. 298 stated: "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." (*Id.* at p. 314.) Thus, if the suspect's initial statement was voluntary, though made in violation of *Miranda,* "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made." (*Oregon v. Elstad, supra,* 470 U.S. at p. 318.) In evaluating the voluntariness of the second

statement, the trier of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect. (*Ibid*.)

Here, the trial court expressly found defendant's initial statement to law enforcement, while inadmissible under *Miranda*, was voluntarily made. Defendant does not contend otherwise. Nor does defendant argue he received an insufficient *Miranda* advisement.

Defendant solely challenges the trial court's findings as to defendant's later statements (post-*Miranda* advisement). The trial court expressly found defendant's initial statement did not taint his post-*Miranda* advisement statements which the court concluded were also made voluntarily. The court stated: "I think the intervention of a valid *Miranda* warning, the defendant's agreement to talk about the case, the brief colloquy that the officer had with the defendant under no coercive circumstances other than the fact that the defendant is in custody, I mean that's a fact in this case but I don't think that negates the admissibility of the second statement when it's preceded by a *Miranda* warning." (Italics added.)

Citing *Missouri v. Seibert* (2004) 542 U.S. 600, defendant contends the statements he made after he had been read his rights under *Miranda* were made involuntarily in light of his initial statement because defendant "knew 'the cat was out of the bag' and obviously felt he had no realistic choice but to say the object was his."

The plurality opinion authored by Justice Souter in *Missouri v. Seibert*, *supra*, 542 U.S. 600, 604, states: "This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda v. Arizona*, 384 U.S. 436 . . . (1966), the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and

unwarned confession could not effectively comply with *Miranda*'s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible."

In *Missouri v. Seibert, supra*, 542 U.S. at page 604 (plur. opn. of Souter, J.), the arresting officer followed instructions from another officer that he refrain from giving the defendant *Miranda* warnings. The officer took the defendant to a police station, left her alone in an interview room for 15 to 20 minutes, and then questioned her (without first providing *Miranda* warnings) for 30 to 40 minutes, during which time he squeezed her arm and repeatedly said to her that the victim "'was also to die in his sleep.'" (*Id.* at pp. 604-605 (plur. opn. of Souter, J.).) The plurality opinion further stated that after the defendant admitted the victim was meant to die, she was given the *Miranda* warnings. (*Id*. at p. 605 (plur. opn. of Souter, J.).) She waived her rights under *Miranda* and the officer resumed the questioning by confronting her with the prewarning statements. (*Missouri v. Seibert, supra,* 542 U.S. at p. 605 (plur. opn. of Souter, J.).) The Supreme Court held that the defendant's repeated statements following the *Miranda* advisement were inadmissible. (*Id.* at p. 604 (plur. opn. of Souter, J.); *id.* at pp. 617-618 (conc. opn. of Breyer, J.); *id.* at p. 618 (conc. opn. of Kennedy, J.).)

Here, the trial court concluded defendant's statements after he was read his rights under *Miranda* were made voluntarily, noting that this case was more similar to *Oregon v. Elstad, supra,* 470 U.S. 298 than to *Missouri v. Seibert, supra,* 542 U.S. 600: "This case, to me, is more like *Oregon vs. Elstad* . . . and where Justice O'Connor said . . . there is no warrant for presuming coercive effect where a suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. And [the] relevant inquiry is whether the second statement was also voluntarily made and whether initial inculpatory statements were made while the defendant was in police custody in his home was voluntary failure to give *Miranda* admonitions did not bar admissibility of station house question—I should say confession—station house confession made shortly

thereafter and preceded by careful admonition and waiver of *Miranda* rights, notwithstanding failure to advise defendant that the prior statement could not be used against him. [¶] This thing happened so quickly that there really wasn't an opportunity for the police to get coercive. They were simply acting as a matter of fact, trying to get the job done, seizing a weapon in a dangerous situation where, if that weapon is in a custodial institution, it could be used on another inmate." (Italics added.)

As discussed *ante*, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission" before having been given *Miranda* warnings "does not warrant a presumption of compulsion." (*Oregon v. Elstad, supra,* 470 U.S. at p. 314.) *Missouri v. Seibert, supra,* 542 U.S. 600 involved such a situation where police officers engaged in "deliberately coercive or improper tactics in obtaining the initial statement." The record does not contain any evidence showing such tactics were in play here.

The trial court, therefore, did not err by admitting defendant's post-*Miranda* advisement statements.

III.

THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY WITH CALCRIM NO. 220.

Defendant contends, "the trial court erred when it did not instruct the jury that it must find *every element* of the charged offense or special allegation true beyond a reasonable doubt."[3] Defendant argues the trial court instructed the jury on reasonable

[3] The Attorney General argues defendant waived the right to challenge CALCRIM No. 220 by failing to object to it at trial. However, "[t]he appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, § 1259.) We therefore address the merits of defendant's argument and review the jury instruction de novo to determine whether it accurately stated the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

doubt by using CALCRIM No. 220 which "omitted the necessary 'prove each element' language."

But the jury was instructed that it must find each element of the charged offense true beyond a reasonable doubt even though the word "element" did not appear in the instructions. The trial court instructed the jury with CALCRIM No. 220 as follows: "The defendant has pleaded not guilty to the charge. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. *This presumption requires that the People prove the defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.* [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (Italics added.)

The jury was also given the following instruction on the crime of possession of a sharp instrument in a penal institution in the form of CALCRIM No. 2745: "The defendant is charged in Count 1 with possessing a weapon, specifically a sharp instrument, while in a penal institution. [¶] To prove that the defendant is guilty of this crime, *the People must prove that*: [¶] 1. The defendant was confined in a penal institution; [¶] 2. The defendant possessed a sharp instrument; [¶] 3. The defendant knew that he possessed the sharp instrument; [¶] AND [¶] 4. The defendant knew that the object was a sharp instrument that could be used as a slashing weapon. [¶] A penal institution is a county jail. [¶] A sharp instrument includes a razor blade. [¶] The People

do not have to prove that the defendant used or intended to use the object as a weapon. [¶] You may consider evidence that the object could be used in a harmless way in deciding if the object is a sharp instrument that could be used as a slashing weapon. [¶] The People do not have to prove that the object was concealable, or carried by the defendant on his person. [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person." (Italics added.)

Defendant's argument that the jury was improperly instructed on reasonable doubt because the word "element" did not appear in the given instruction was rejected in *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087 (*Ramos*). In *Ramos*, the defendant argued, "the trial court erred when it failed to instruct the jury that it must find *every element* of the charged offense or special allegation true beyond a reasonable doubt. Specifically, [the defendant] claim[ed] reversal [wa]s required because the instruction given (CALCRIM No. 220) omitted the 'each element' language." (*Ibid.*) In affirming the defendant's conviction, the appellate court in *Ramos* held: "CALCRIM No. 220 adequately explains the applicable law. The instruction explicitly informed the jurors that '*Whenever* I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.'" (*Id.* at p. 1088.) The trial court in *Ramos*, like the trial court in the instant case, instructed the jury with the applicable CALCRIM instruction which stated the prosecution had to prove each of the elements of the charged offense (even though the word "elements" did not appear in the instruction). (*Id.* at pp. 1088-1089.) The appellate court further stated, "[i]f we assume, as we must, that '"the jurors [were] intelligent persons and capable of understanding *and correlating* all jury instructions . . . given . . ." [citation]' [citation], then we can only conclude that the instructions, taken as a whole, adequately informed the jury that the prosecution was

required to prove each element of the charged crime beyond a reasonable doubt." (*Id.* at p. 1089.)

Defendant cites *People v. Phillips* (1997) 59 Cal.App.4th 952, *People v. Crawford* (1997) 58 Cal.App.4th 815, and *People v. Vann* (1974) 12 Cal.3d 220 for the proposition that "jury instructions which do not specifically require proof beyond a reasonable doubt of *each element* are inadequate." As pointed out by the appellate court in *Ramos, supra,* 163 Cal.App.4th 1082, 1089, none of those cases addressed the issue whether the trial court must use the word "element" in instructing a jury that the prosecutor must prove each element of the charged offense beyond a reasonable doubt. Instead, in each of those cases, the court reversed a criminal conviction on the ground the trial court failed to instruct the jury at the conclusion of the trial regarding the presumption of innocence, and omitted any instruction defining reasonable doubt. (*Ibid.*)

Defendant here (like the defendant in *Ramos, supra,* 163 Cal.App.4th 1082, 1089) also cites *People v. Harris* (1994) 9 Cal.4th 407, 438 (conc. & dis. opn. of Mosk, J.) in support of his argument the word "element" must appear in the jury instructions. Again, as pointed out by the *Ramos* court, the point page provided by defendant does not refer to the majority opinion but to Justice Mosk's separate concurring and dissenting opinion. (*Ramos, supra,* 163 Cal.App.4th at p. 1089.) Furthermore, the issue addressed in that portion of Justice Mosk's separate concurring and dissenting opinion was whether the jury had been improperly instructed on the definition of "immediate presence" in the context of the crime of robbery. (*Ramos, supra,* 163 Cal.App.4th at p. 1089.)

Finally, defendant, like the defendant in *Ramos, supra,* 163 Cal.App.4th 1082, 1090, cites several out-of-state authorities, arguing that many other jurisdictions contain the "each element" or "every element" language in their jury instructions on reasonable doubt. The *Ramos* court responded to this argument, stating: "While we do not doubt that the use of such language is appropriate [citation], defendant has not cited

any California or United States Supreme Court authority holding that it is constitutionally required." (*Ibid.*) Defendant in the instant case has similarly failed to show the word "element" is constitutionally required in instructions on reasonable doubt. We find no error.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.